

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

GREAT AMERICAN INSURANCE)	Case No. 12-00833-SC
COMPANY, and GREAT AMERICAN)	
INSURANCE COMPANY OF NEW YORK,)	ORDER GRANTING MOTION FOR
)	<u>PARTIAL SUMMARY JUDGMENT</u>
Plaintiffs,)	
)	
v.)	
)	
MICHAEL CHANG, d/b/a SUNRISE)	
CLEANERS, INC., and ROXANNE)	
CHANG, d/b/a SUNRISE CLEANERS,)	
INC.,)	
)	
Defendants.)	

I. INTRODUCTION

This case involves an insurance coverage dispute arising from underlying state court actions and government orders concerning the alleged contamination of a property owned by Defendant Michael Chang (the "Property"). Defendant Michael Chang and his wife, Defendant Roxanne Chang (collectively, the "Changs"), operated a dry cleaning business on the property from 1977 to 1981. During this period, the Property was insured by the above-captioned plaintiffs (collectively, "Great American"). Through this action, Great American seeks a declaration that it does not owe a duty to defend or indemnify the Changs in the underlying actions. Now

1 before the Court is Great American's motion for partial summary
2 judgment. ECF No. 64 ("MSJ"). The motion is fully briefed, ECF
3 Nos. 68 ("Opp'n"), 69 ("Reply"), and appropriate for determination
4 without oral argument per Civil Local Rule 7-1(b).¹ For the
5 reasons set forth below, Great American's motion for partial
6 summary judgment is GRANTED.

7
8 **II. BACKGROUND**

9 The Property at issue in this case is located on Baldwin
10 Avenue in San Mateo, California. ECF Nos. 16 ("Compl.") ¶ 4, 29
11 ("Answer") ¶ 4. Various parties have alleged that the Property is
12 contaminated with PCE and stoddard solvent due to leaking
13 underground storage tanks. The Changs acquired the Property in
14 1977, along with a dry cleaning business already located on the
15 Property. Michael Chang operated a dry cleaners on the Property
16 from 1977 until about 1981 under the name Sunrise Cleaners. In
17 1981, Michael Chang sold the Sunrise Cleaners business, though he
18 continued to own the Property and leased the premises to others.

19 Soon after the Changs acquired the Property, Great American
20 issued a policy to Sunrise Cleaners for a policy period of December
21 15, 1977 to December 15, 1980. Great American later issued a
22 policy to Michael Chang for a policy period of December 15, 1980 to

23
24 ¹ The Changs' opposition brief exceeds the page limits set forth in
25 Civil Local Rule 7-3(a). Further, the Changs filed a surreply
26 brief without seeking leave of the Court, in violation of Civil
27 Local Rule 7-3(d). ECF No. 73 ("Surreply"). The Surreply does not
28 present any evidence or authority that was previously unavailable
to the Changs. Nor does it respond to new arguments raised on
reply. In the interest of justice, the Court has reviewed all of
the arguments raised by the Changs. However, the Court advises the
Changs to comply with the Civil Local Rules going forward, as
future violations may have consequences.

1 December 15, 1983. The Changs claim that Roxanne Change is an
2 additional insured under the policies. Neither Great American nor
3 the Changs retained a copy of the policies, but the parties have
4 stipulated to some of the policy terms, including policy limits of
5 \$500,000 for property damage.

6 The Changs later leased the Property to Bilal Kartal
7 ("Kartal"), who opened an Italian restaurant on the premises. In
8 2006, Kartal brought a nuisance action against the Changs in the
9 California Superior Court for San Mateo County in connection with
10 an alleged solvent leak on the Property (the "Kartal Action"). ECF
11 No. 65 ("RJN") Ex. 1 ("Kartal Compl."). Kartal alleges the
12 following: At the time the Changs purchased the Property in 1977,
13 they knew or should have known that one or more storage tanks
14 containing dry cleaning solvent were buried under a previously
15 unused portion of the Property behind what is now the restaurant.
16 Id. ¶ 3. In 1992, Kartal built a patio behind the restaurant. Id.
17 ¶ 1. The patio was later enclosed and became a banquet area
18 central to the restaurant's business. Id. In or around 2002 or
19 2003, customers began noticing a peculiar odor coming from the
20 banquet area, which was caused by solvents leaking from the buried
21 storage tanks. Id. ¶ 6. The odor became worse over time and drove
22 customers away from the restaurant. Id. ¶¶ 7-8.

23 At some unspecified time, the California Regional Water
24 Quality Control Board (the "State Water Board") began to
25 investigate the alleged contamination at the Property. Zacharias
26 Decl. Ex. 1.² On December 28, 2007, the Changs tendered the Kartal

27
28 ² Catherine Zacharias ("Zacharias"), a claims manager at Great American who has worked on the Changs' claims, filed a declaration

1 Action, along with the state investigation, to Great American for
2 defense and indemnity. Id. As to the government investigation,
3 the Changs informed Great American: "The local Environmental Health
4 Department, [State Water Board] and federal Environmental
5 Protection Agency are investigating the liability of your insured.
6 Governmental agencies have ordered action on the part of the
7 responsible parties to investigate the occurrence and mitigate the
8 damages to groundwater and off-site properties." Id. Great
9 American initially denied the tender with respect to both the
10 Kartal Action and the government investigation.

11 After Great American denied the tenders, the Changs filed
12 cross-complaints in the Kartal Action against various third
13 parties, including Grace Yamaguchi ("Yamaguchi"), who allegedly
14 operated a dry cleaners on the property before the Changs, and
15 Christopher Chang (no relation to the Changs), who allegedly
16 operated a dry cleaners on the property after the Changs. RJN Exs.
17 3-4. In their amended cross-complaint in the Kartal Action, the
18 Changs alleged that Yamaguchi and Christopher Chang caused the
19 solvent contamination on the Property and asserted claims for
20 negligence, indemnity, and contribution, among other things. RJN
21 Ex. 4. The Changs prayed for "response costs, lost rents and all
22 other damages incurred due to Cross-Defendants['] [conduct]," and
23 "damages, defense costs and potential liability, if any." Id. at
24 20-21.

25 On February 11, 2009, the court in the Kartal Action entered
26 "Pre-Trial Order No. 5," which stated: "In order to avoid
27

28 in support of Great American's motion for summary judgment. ECF
No. 64-6 ("Zacharias Decl.").

unnecessary filing of pleadings by Defendants and Cross-Defendants in this action, it shall be deemed that . . . [a]ll Defendants and Cross-Defendants have filed Cross-Complaints for implied equitable indemnity and for a determination of comparative negligence against all of the Defendants and Cross-Defendants." RJN Ex. 10. Michael Chang then requested that Great American indemnify him with respect to the cross-complaints that were deemed filed in the Kartal Action. Compl. ¶ 83; Answer ¶ 83. In response, Great American denied that the "deemed" affirmative cross-complaints gave rise to a duty to defend, but agreed to provide a defense subject to a full reservation of rights. Id.

Yamaguchi and Christopher Chang filed actual cross-complaints against the Changs in late 2010. RJN Exs. 5 ("C. Chang X-Compl."), 6 ("Yamaguchi X-Compl."). These cross-complaints also named as a defendant Eun Kyung Lee ("Lee"), who allegedly operated a dry cleaning business on the Property after Christopher Chang, from approximately 1989 until 1996. C. Chang X-Compl. ¶ 23; Yamaguchi X-Compl. ¶ 21. Yamaguchi and Christopher Chang's cross-complaints essentially sought indemnity and contribution from the Changs for any damages for which they were held liable. In March 2011, Lee also filed a cross-complaint for indemnity and contribution against the Changs, Yamaguchi, and Christopher Chang. RJN Ex. 7 ("Lee X-Compl."). Additionally, Lee sought "damages in the form of property damage, contents damage, loss of value, loss of use, loss of rents, repair costs, and other economic and non-economic damages." Id. at 5.

Apparently, the State Water Board continued to investigate contamination on the Property as the Kartal Action was ongoing.

1 The parties have not filed with the Court any documents actually
2 issued by the State Water Board. However, according to an April
3 10, 2009 letter from the Changs' counsel, the Changs applied for
4 funding from the California Underground Storage Tank Fund (the
5 "Storage Tank Fund") for pollution clean-up on the Property.
6 Zacharias Decl. Ex. 4. The State Water Board denied the
7 application, and the Changs requested that Great American pay for
8 legal fees and costs incurred to challenge that denial. Id.
9 Subject to a complete reservation of rights, Great American agreed
10 to pay, and has paid, certain fees and costs incurred by the Changs
11 to prosecute the litigation against the State Water Board.
12 Zacharias Decl. ¶ 10.

13 At some unspecified time, the Changs conducted a voluntary
14 site investigation and recommended further investigation of alleged
15 PCE contamination on the Property. Compl. ¶ 92; Answer ¶ 92.
16 Sometime in 2010, the State Water Board approved the proposed
17 investigation and asked the Changs to submit a work plan. Id. The
18 Changs requested that Great American pay the costs of the site
19 investigation approved by the State Water Board. Zacharias Decl. ¶
20 11, Ex. 5. Great American agreed to pay certain costs in
21 connection with the investigation, subject to a full reservation of
22 rights. Id. ¶ 11.

23 Great American brought this action against the Changs in
24 February 2012. Great American's amended complaint asserts nine
25 causes of action for, inter alia, declaratory relief, reimbursement
26 of money paid, and breach of contract. Great American essentially
27 seeks a declaration that it does not owe the Changs a duty to
28 defend or indemnify as to the Kartal Action or the government

1 orders. It also seeks reimbursement of the amounts it has paid or
2 will pay on behalf of the Changs. The Changs have counterclaimed
3 for breach of contract and tortious breach of the covenant of good
4 faith and fair dealing. Great American now moves for partial
5 summary judgment on its claims and the Changs' counterclaims.

6 7 **III. LEGAL STANDARD**

8 Entry of summary judgment is proper "if the movant shows that
9 there is no genuine dispute as to any material fact and the movant
10 is entitled to judgment as a matter of law." Fed. R. Civ. P.
11 56(a). Summary judgment should be granted if the evidence would
12 require a directed verdict for the moving party. Anderson v.
13 Liberty Lobby, Inc., 477 U.S. 242, 251 (1986). Thus, "Rule 56[]
14 mandates the entry of summary judgment . . . against a party who
15 fails to make a showing sufficient to establish the existence of an
16 element essential to that party's case, and on which that party
17 will bear the burden of proof at trial." Celotex Corp. v. Catrett,
18 477 U.S. 317, 322 (1986). "The evidence of the nonmovant is to be
19 believed, and all justifiable inferences are to be drawn in his
20 favor." Anderson, 477 U.S. at 255. However, "[t]he mere existence
21 of a scintilla of evidence in support of the plaintiff's position
22 will be insufficient; there must be evidence on which the jury
23 could reasonably find for the plaintiff." Id. at 252.

24 25 **IV. DISCUSSION**

26 Great American has asked the Court to render summary judgment
27 on ten issues: (1) & (2) whether Great American has a duty to
28 defend or indemnify the Changs with respect to government agency

orders to address pollution; (3) & (4) whether Great American has a duty to defend or indemnify the Changs with respect to the complaint in the Kartal Action; (5) whether Great American has duty to pay the Changs' expenses of pursuing claims against other parties in the Kartal Action; (6) whether Great American has a duty pay the Changs' expenses in pursuing litigation against the Storage Tank Fund; (7) & (8) whether Great American has a duty to defend or indemnify as to the cross-complaints against the Changs in the Kartal Action; (9) & (10) whether the Changs may recover against Great American on their counterclaims for breach of contract and breach of the covenant of good faith and fair dealing.

A. The Duty to Defend and the Duty to Indemnify

Before considering the particular issues raised by Great American's motion for partial summary judgment, the Court reviews some general principles concerning the duty to defend and the duty to indemnify. An insurer generally has a duty to indemnify its insured for risks covered by the relevant insurance policy. The duty to indemnify and the duty to defend are correlative, but are not coterminous. Certain Underwriters at Lloyd's of London v. Super. Ct. (Powerine Oil Co.) ("Powerine"), 24 Cal. 4th 945, 958 (Cal. 2001). "Whereas the duty to indemnify can arise only after damages are fixed in their amount, the duty to defend may arise as soon as damages are sought in some amount." Id. (citations omitted). Further, the duty to defend is broader in scope than the duty to indemnify. Horace Mann Ins. Co. v. Barbara B., 4 Cal. 4th 1076, 1081 (Cal. 1993). An insurer must defend its insured against a claim that creates even the potential for liability, and so an insurer may owe its insured a duty to defend in a case where no

1 damages are ultimately awarded. Id. Moreover, in "mixed actions"
2 -- actions in which some claims are at least potentially covered by
3 an insurer and the others are not -- "the insurer has a duty to
4 defend the action in its entirety." Buss v. Super. Ct., 16 Cal.
5 4th 35, 47-48 (Cal. 1997).

6 **B. Duty to Defend as to the Government Orders**

7 Great American argues that, under the stipulated language of
8 the policies, it has no duty to defend the Changs with respect to
9 government orders pertaining to pollution. The policies state:
10 "The company shall have the right and duty to defend any suits
11 against the insured seeking damages on account of such bodily
12 injury or property damage" Zacharias Decl. Ex. 2 at EXH
13 018, Ex. 3 at EXH 045. Relying on Foster-Gardner, Inc. v. National
14 Union Fire Insurance Co., 18 Cal. 4th 857 (Cal. 1998), Great
15 American argues that the duty to defend "suits" does not include
16 the duty to pay costs of responding to government agency orders.
17 Opp'n at 15.

18 In Foster-Gardner, the California Department of Toxic
19 Substances Control ("DTSC") found that the plaintiff had incurred
20 liability for cleaning up contamination on the site of his
21 wholesale pesticide and fertilizer business. 18 Cal. 4th at 861-
22 63. The plaintiff tendered the defense of the DTSC order to his
23 insurers, which had issued policies providing that they had a "duty
24 to defend any suit against the insured seeking damages"
25 Id. at 863. The California Supreme Court held that the insurers
26 did not have a duty to defend because the DSTC Order did not
27 constitute a "suit," which the court defined as "a court proceeding
28

1 initiated by the filing of a complaint."³ Id. at 887.

2 In response, the Changs cite to an earlier California Supreme
3 Court decision, AIU Insurance Co. v. Superior Court, 51 Cal. 3d
4 807, 818 (Cal. 1990). Opp'n at 6. In AIU, the United States and
5 local administrative agencies brought third-party suits against an
6 insured for alleged violations of various environmental laws and
7 the alleged contamination of seventy-nine different hazardous waste
8 sites. 51 Cal. 3d at 815. The insured brought an action against
9 its insurer seeking a judicial declaration that it was entitled to
10 coverage for costs it might have become obligated to pay as a
11 result of injunctive relief or reimbursement ordered in the third-
12 party suits. Id. at 816. The court found that the insurer was not
13 entitled to summary adjudication, because the insured's liability
14 in the third-party suits could constitute damages under the
15 insurance policies. Id. at 843.

16 The Court finds that AIU is inapposite here. Unlike the
17 insured in AIU, there is no indication that the Changs have been
18 sued in court by a government agency. As the California Supreme
19 Court observed in Foster-Gardner: "AIU's holding -- that there is
20 coverage for certain damages sought in a third-party suit
21 prosecuted [by a government agency] -- has nothing to do with
22 whether the carrier has a duty to defend when no third-party suit
23 has been filed." 18 Cal. 4th at 857 (quotations omitted).

24 The Changs also suggest that it is irrelevant whether the
25 government agency orders constitute suits for the purposes of the

26 ³ Courts in other states have adopted a broader interpretation,
27 holding that an agency proceeding does constitute a suit for the
28 purposes of triggering insurance coverage. See Pac. Employers Ins.
Co. v. Servco Pac., Inc., 273 F. Supp. 2d 1149, 1156 (D. Haw.
2003).

1 policies, since "there are pleadings before the San Mateo County
2 Superior Court that are asking the court to hold the Changs liable
3 for compliance with an administrative order to investigate
4 pollution-impacted third party properties" Opp'n at 6.
5 The Changs appear to be referring to the cross-complaints filed in
6 the Kartal Action. But whether Great American has a duty to defend
7 in the Kartal Action is a separate question from whether it has a
8 duty to defend with respect to the government agency orders.

9 Accordingly, the Court GRANTS Great American's motion for
10 summary judgment as to its duty to defend the Changs against the
11 government orders pertaining to pollution.

12 **C. Duty to Indemnify as to the Government Orders**

13 The policies state: "[Great American] agrees . . . [t]o pay on
14 behalf of the insured all sums which the insured shall become
15 legally obligated to pay as damages because of property damage
16 caused by the occurrence." Compl. ¶ 31; Answer ¶ 31. Relying on
17 Powerine, Great American contends that this language does not
18 create a duty to indemnify the Changs as to the government orders.
19 MSJ at 15-16.

20 Powerine concerned whether an insurer was liable for costs
21 incurred by the insured in complying with orders issued during
22 administrative environmental proceedings. 24 Cal. 4th at 952-55.
23 Like the policies at issue here, the Powerine policy required the
24 insurer to defend "any suit seeking damages" and to "pay all sums
25 that the insured becomes legally obligated to pay as damages." Id.
26 at 950. Based on its earlier holding in Foster-Gardner, which is
27 discussed in Section IV.B supra, the California Supreme Court held
28 that the policy only created a duty to pay money ordered by a court

1 and did not extend to any expenses required by an administrative
2 agency pursuant to an environmental statute. Id. at 951. The
3 Court reasoned that the duty to defend is broader than the duty to
4 indemnify. Id. at 961. Thus, if an insurer's duty to defend is
5 not broad enough to extend beyond a civil action pending in court,
6 the duty to indemnify is not broad enough to extend beyond money
7 damages awarded by a court. Id. at 961.

8 The Changs appear to argue that the government orders involve
9 damages because of the claims and counterclaims asserted in the
10 Kartal Action. See Opp'n at 7. The Changs' reasoning seems to be
11 that the Kartal Action creates the potential for a court judgment
12 finding them liable for the cleanup ordered by the government. Id.
13 This argument is unavailing for the reasons set forth in Section
14 IV.B supra. The pertinent question here is whether the government
15 orders, not the pleadings in the Kartal Action, create a duty to
16 indemnify. The Court addresses Great American's duty to indemnify
17 as to the Kartal Action below.

18 Since there is no indication that the government has brought a
19 civil action against the Changs, the Court finds that Great
20 American does not have a duty to indemnify the Changs with respect
21 to the government orders.

22 **D. Duty to Defend and Indemnify as to Kartal's Complaint**

23 Great American contends that it does not have a duty to defend
24 or indemnify the Changs as to the claims asserted against them by
25 Kartal, because the damages alleged in Kartal's complaint occurred
26 after the expiration of the policy period. MSJ at 16-19. Great
27 American points out that the Changs' policy period ran from 1977 to
28 1983, while Kartal alleges that he was first injured by

1 contamination caused by the leaking storage tanks in or around
2 2002, when his customers first noticed a peculiar odor emanating
3 from the property. Id. The Changs respond that they are entitled
4 to coverage since the loss of use asserted by Kartal was allegedly
5 caused by the Changs' failure to deal with the underground storage
6 tanks when they purchased the property in 1977. Opp'n at 8-9.

7 The Great American policies issued to the Changs constitute
8 third-party liability insurance, since they provide coverage for
9 liability of the insured to a third party, as opposed to coverage
10 for loss or damage sustained directly by the insured. See
11 Zacharias Decl. at EXH 019 ("This policy does not apply to . . .
12 property damage to property owned or occupied by or rented to the
13 insured").⁴ The policies obligate Great American "[t]o pay
14 on behalf of the insured all sums which the insured shall become
15 legally obligate to pay as damages because of property damage
16 caused by an occurrence" and "to defend any suits against the
17 insured seeking damages on account of . . . property damage."
18 Zacharias Decl. Ex. 1 at EXH 018. The policies define "property
19 damage" to mean:

20
21 (1) physical injury to or destruction of tangible
22 property which occurs during the policy period
23 including the loss of use thereof at any time
24 resulting therefrom, or (2) loss of use of tangible
25 property which has not been physically injured or
26 destroyed provided such loss of use is cause by an
27 occurrence during the policy period.

28 ⁴ See also Montrose Chem. Corp. v. Admiral Ins. Co., 10 Cal. 4th
645, 663-666 (Cal. 1995) (discussing the distinction between first-
party and third-party liability insurance).

1 Id. at EXH 021. They define "occurrence" to mean "an accident,
2 including continuous or repeated exposure to conditions, which
3 results during the policy period in bodily injury or property
4 damage neither expected nor intended from the standpoint of the
5 insured." Id.

6 The California Supreme Court addressed almost identical policy
7 language in the context of third-party liability insurance in
8 Montrose.⁵ Montrose involved property damage that was continuous
9 or progressing over a number of years and an insured who had
10 obtained a series of successive liability policies from multiple
11 insurers while the property damage was ongoing. 10 Cal. 4th at
12 655. At issue was whether an insurer whose policy covered only the
13 last few years of this period had a duty to defend suits alleging
14 continuous and progressive property damage that resulted from
15 hazardous chemicals that the insured started manufacturing before,
16 but continued manufacturing during, the policy period. Id. at 656-
17 661. The court held that a continuous condition becomes an
18 occurrence for the purposes of the policy when the property damage
19 manifests:

20 Th[e] policy language unambiguously distinguishes
21 between the causative event -- an accident or
22 "continuous and repeated exposure to conditions" --
and the resulting "bodily injury or property damage."
It is the latter injury or damage that must "occur"

23 ⁵ The insurer in Montrose contracted to "pay on behalf of the
24 insured all sums which the insured shall become legally obligated
25 to pay as damages because of . . . bodily injury, or . . . property
26 damage to which this insurance applies, caused by an occurrence . .
27 . ." 10 Cal. 4th at 668. The policy defined "property damage" as
28 "(1) physical injury to or destruction of tangible property which
occurs during the policy period, including the loss of use thereof
at any time resulting therefrom" Id. Occurrence meant "an
accident, including continuous or repeated exposure to conditions,
which results in bodily injury or property damage neither expected
nor intended from the standpoint of the insured." Id. at 669.

1 during the policy period, and "which results" from the
2 accident or "continuous and repeated exposure to
conditions."

3 Id. at 669.

4 The Montrose court found that its decision was confirmed by
5 prior case law, including Remmer v. Glens Falls Indemnity Co., 140
6 Cal. App. 2d 84 (Cal. Ct. App. 1956). Id. In Remmer, the insureds
7 had obtained property insurance for the period of 1945 through
8 1948. 140 Cal. App. 2d at 85. In 1947, during the policy period,
9 the insureds graded and filled portions of their property. Id. In
10 1952, after the policy period, a landslide on the property damaged
11 an adjacent lot. Id. The owner of the adjacent lot brought a
12 nuisance action against the insureds, and the insureds tendered the
13 suit to their insurer. Id. The Court held that the loss was not
14 covered because "the occurrence of an accident within the meaning
15 of the policy is not the time the wrongful act was committed"
16 (i.e., the grading of the property in 1947), "but the time when the
17 [third] party was actually damaged" (i.e., the landslide in 1952).
18 Id. at 88.

19 Interpreting the language of the policies pursuant to Montrose
20 and Remmer, Great American does not owe a duty to defend or
21 indemnify the Changs as to Kartal's complaint. With respect to the
22 policies' definition of "property damage," Kartal alleges that the
23 physical injury or destruction of tangible property manifested as
24 early as 2002, when Kartal first started losing customers due to
25 the odor caused by the solvent leak. Likewise, the "occurrence" or
26 "accident" about which Kartal complains happened as early as 2002.
27 The policies expired in 1983, about nineteen years prior to the
28 events that could potentially trigger coverage.

1 The Changs argue that Kartal's complaint alleges occurrences
2 in 1977, including failure to discover the storage tanks and
3 failure to discover the contamination at the time of the purchase
4 that proximately caused the property damage. Opp'n at 8. But the
5 California Supreme Court rejected this same reasoning in Montrose
6 when it found that the "causative event" does not constitute an
7 occurrence for the purpose of a similarly worded policy.⁶ 10 Cal.
8 4th at 669. The pertinent question is not when the negligent act
9 allegedly occurred, but when the third party was allegedly damaged.
10 See id. In this case, there is no dispute the Kartal alleges that
11 he was damaged well after the expiration of the policy period.

12 The Changs also argue that the policies provide coverage for
13 loss of use that occurs "at any time." Opp'n at 9. Specifically,
14 the policies define property damage as, among other things,
15 "physical injury to or destruction of tangible property which
16 occurs during the policy period including the loss of use thereof
17 at any time resulting therefrom." Zacharias Decl. Ex. 1 at EXH 21.
18 The Changs' interpretation of this language is unpersuasive. While
19 the "loss of use" can occur "at any time," it must result from
20 property damage "which occurs during the policy period." In this
21 case, Kartal could not have possibly suffered property damage
22 during the policy period because he leased the Property over a
23 decade after the policy period's expiration. Even if the Changs

24 ⁶ Contrary to the Changs' suggestion, State v. Continental
25 Insurance Co., 55 Cal. 4th 186 (Cal. 2012), does not hold
26 otherwise. See Opp'n at 9. Continental Insurance stands for the
27 proposition that an insurer may be held liable for ongoing property
28 damage that commenced prior to the policy period as long as some of
the continuous property damage occurred during the policy period.
55 Cal. 4th at 199-200. In this case, there is no evidence that
any of the property damage alleged occurred during the Great
American policy period.

1 suffered some property damage from the leaking storage tanks during
2 the policy period, the policies only provide coverage for damage to
3 third parties.⁷

4 For these reasons, the Court finds that Great American does
5 not have a duty to defend or indemnify as to Kartal's complaint.

6 **E. Duty to Pay Costs Incurred Prosecuting Cross-Complaints**
7 **in the Kartal Action and Seeking Recovery from the**
8 **Storage Tank Fund**

9 Next, the Court must determine whether Great American must pay
10 the costs incurred by the Changs in pursuing cross-complaints
11 against various third parties in the Kartal Action or seeking
12 recovery from the Storage Tank Fund. The Changs' arguments in
13 favor of finding a duty here are unpersuasive.

14 First, the Changs argue that Great American is obligated to
15 fund their cross-complaints because they are an essential part of
16 the Changs' defense in the Kartal Action. Opp'n at 10. However,
17 under California law, an insurer does not have a duty to prosecute
18 a counterclaim or a cross-complaint on behalf of the insured absent
19 some contractual provision requiring such action. See James 3
20 Corp. v. Truck Ins. Exch., 91 Cal. App. 4th 1093, 1105-06 (Cal. Ct.
21 App. 2001). The Changs have pointed to no such contractual
22 provision. In any event, as discussed in Section IV.C supra, Great
23 American does not owe the Changs a duty to defend or indemnify with
24 respect to Kartal's claims against them.

25 _____
26 ⁷ The Changs argue that the definition of "property damage" used by
27 Great American in policies issued after 1993 shows that their
28 interpretation is correct. Surreply at 8. As an initial matter,
the Court is only concerned with the language in the policies at
issue. Further, even if the revised language were used in the
relevant policies, the Court would reach the same conclusion.

1 The Changs also argue that the California Supreme Court's
2 decision in Ameron International Corporation v. Insurance Co., 50
3 Cal. 4th 1370 (Cal. 2010), requires Great American to provide
4 coverage.⁸ Opp'n at 12. The Court disagrees. In Ameron, the
5 Supreme Court held that administrative adjudicative proceedings
6 before an administrative law judge, which involved twenty-two days
7 of trial, numerous witnesses, and substantial evidence, constituted
8 a "suit" triggering an insurer's duty to defend. Ameron, 50 Cal.
9 4th at 1374. As the Changs point out, Ameron could be construed as
10 "emphasizing form over substance." However, nothing in that
11 opinion suggests that an insurer has a duty to fund a cross-
12 complaint or any other type of offensive action by an insured for
13 contribution against a third party.

14 Finally, the Changs argue that Great American has a duty to
15 fund their action against the Storage Tank Fund because Great
16 American "voluntarily and in writing" agreed to advance the Changs'
17 costs in that action. Opp'n at 12-13. However, as the Changs
18 concede, Great American advanced those costs under a full
19 reservation of rights. See Opp'n at 13. An insurer does not owe a
20 duty to defend merely because it provides a defense under a
21 reservation of rights. In fact, an insurer may later seek
22 reimbursement from the insured for defending claims that are not
23 even potentially covered. See Buss, 16 Cal. 4th at 48.

24 ///

25
26 ⁸ The Changs cite Ameron International Corp. v. Insurance Co., 150
27 Cal. App. 4th 1050 (Cal. Ct. App. 2007), the unpublished opinion by
28 the California Court of Appeal that was later reversed by the
California Supreme Court; however, they appear to be referring to
the California Supreme Court opinion.

1 Accordingly, the Court finds that Great American does not owe
2 the Changs a duty to defend or indemnify with respect to their
3 cross-complaints against third parties in the Kartal Action or
4 their action against the Storage Tank Fund.

5 **F. Duty to Defend and Indemnify as to the Cross-Complaints**
6 **Filed by Christopher Chang, Yamaguchi, and Lee**

7 Next, the Court considers whether Great American has a duty to
8 defend or indemnify the Changs as to the cross-complaints filed
9 against them by Christopher Chang, Yamaguchi, and Lee in the Kartal
10 Action. As discussed above, the policies obligate Great American
11 to defend "any suits against the [Changs] seeking damages," and to
12 pay all sums "the [Changs] shall become legally obligated to pay as
13 damages." Great American argues that the cross-complaints do not
14 trigger coverage because they do not seek affirmative recovery from
15 the Changs. MSJ at 20. Rather, according to Great American, they
16 merely seek to reduce any liability the cross-complaintants may be
17 found to have to the Changs in the Kartal Action. Id.

18 Great American relies on the California Court of Appeal's
19 decision in CDM Investors v. Travelers Casualty and Surety Co., 139
20 Cal. App. 4th 1251 (Cal. Ct. App. 2006). MSJ at 21. That case
21 concerned alleged contamination on a commercial property owned by
22 the plaintiffs. CDM, 139 Cal. App. 4th at 1257. After the State
23 Water Board ordered the plaintiffs to test the property for
24 pollutants, the plaintiffs sued their former tenants under CERCLA
25 to apportion liability for response costs. Id. at 1266. The
26 tenants raised affirmative defenses seeking to apportion
27 responsibility to plaintiffs. Id. The plaintiffs argued that
28 those affirmative defenses were the functional equivalent of a

1 counterclaim and that the plaintiffs' insurer had a duty to defend
2 as to those affirmative defenses. Id. at 1266-67. The court held
3 that an affirmative defense would only constitute a suit seeking
4 damages for the purposes of the policy if the affirmative defense
5 "would unquestionably have been a suit for damages if asserted in a
6 court of law." Id. at 1269. The court found that the affirmative
7 defenses asserted by the tenants did not trigger coverage because
8 they were "purely defensive":

9
10 Here, plaintiffs' tenants had no independent suit
11 against [plaintiffs] that they sought to reduce to a
12 monetary value by asserting it as a setoff payment for
13 the liability that [plaintiffs] was alleging against
14 them. They had no claim whatsoever and could not have
15 sued [plaintiffs] for anything. Regardless of
16 plaintiffs' characterization of a CERCLA proceeding as
17 an action to apportion liability, the reality of CDM's
18 CERCLA case is that [plaintiffs] sued the tenants for
19 indemnity as to an obligation imposed upon [them] by
20 the [State Water] Board and the tenants countered with
21 an indemnity claim against [plaintiffs]. In this
22 posture, the tenants' indemnity claim was purely
23 defensive -- it sought and functioned only to reimpose
24 upon [plaintiffs] what [plaintiffs] w[ere] already
25 legally obligated for.

26 Id.

27 Like the affirmative defenses in CDM, the cross-complaints in
28 this action are almost exclusively defensive. The cross-complaint
filed by Yamaguchi merely seeks to hold the Changs liable or
partially liable for any judgments rendered against Yamaguchi. See
Yamaguchi X-Compl. (praying that the cross-defendants be adjudged
liable to Yamaguchi for "total," "partial," and "equitable or
comparative indemnity"). As does the cross-complaint filed by
Christopher Chang. See C. Chang X-Compl. Lee's cross-complaint is

1 slightly different. In addition to seeking a set-off against the
2 Changs, Lee asserts "damages in the form of property damage,
3 contents damage, loss of value, loss of use, loss of rents, repair
4 costs, and other economic and non-economic damages in an amount
5 according to proof." Lee X-Compl. at 5. However, since Lee
6 operated a dry cleaners on the property between 1989 and 1996,
7 several years after the Great American policy period, these damages
8 cannot trigger a duty to defend or indemnify under the policies.
9 See Section IV.D supra.

10 The Changs' opposition brief provides a confused set of
11 arguments on this issue. The Changs repeatedly concede that
12 Yamaguchi, Christopher Chang, and Lee cross-complaints are "purely
13 defensive," but the Changs then go on to argue that these cross-
14 complaints seek affirmative relief for property damage. Compare
15 Opp'n at 14-15 with id. at 25. They contend that CDM is
16 inapposite, but then appear to point out the similarities between
17 that case and the instant action. Id. at 15. The Changs also
18 argue, without further explanation, that the cross-complaints
19 should trigger coverage because they are "an essential part of the
20 Changs defense in the underlying Kartal action." Id. at 14. Once
21 again, the Changs urge the Court to place "substance over form,"
22 but they fail to cite any on-point case law which would support
23 their position. The Changs' surreply brief does little to clarify
24 their position. In it, the Changs assert that the cross-complaints
25 show the potential for coverage, because they do not allege when
26 the contamination on the property started or stopped. Surreply at
27 3. However, the Changs again concede that the cross-complaints are
28 "'defensive' in nature." Id. at 4.

1 For these reasons, the Court finds that Great American does
2 not have a duty to defend or indemnify as to the cross-complaints
3 filed by Yamaguchi, Christopher Chang, and Lee.

4 **G. The Changs' Counterclaims for Breach of Contract and**
5 **Breach of the Covenant of Good Faith and Fair Dealing**

6 Finally, Great American moves for summary judgment on the
7 Changs' two counterclaims. MSJ at 24-25. Great American reasons
8 that if the Court finds that Great American does not owe the Changs
9 a duty to defend or indemnify in any of the underlying actions,
10 then the Changs cannot possibly show that Great American breached
11 its duty to defend and indemnify or engaged in bad faith. Id. The
12 Changs do not appear to dispute this reasoning. They merely argue
13 that if the Court does find that Great American owes a duty, then
14 the Court should find that it breached that duty. Opp'n at 16-17.
15 As Great American has prevailed on all of the issues discussed
16 above, the Court finds that the Changs cannot succeed on their
17 counterclaims.

18
19 **V. CONCLUSION**

20 In sum, the Court finds that the Changs' Great American
21 insurance policies, which provided coverage against third-party
22 lawsuits from 1977 to 1983, do not provide coverage for lawsuits
23 and government actions commenced over twenty years after the
24 policies' expiration. Accordingly, the Court GRANTS Great
25 American's motion for partial summary judgment. The Court finds
26 that Great American is entitled to partial summary judgment of the
27 following issues:
28

- Under the language of its insurance policies, Great American has no duty to defend or indemnify the Changs with respect to government orders to address pollution.
- Under the language of its insurance policies, Great American has no duty to defend or indemnify the Changs as to the complaint filed by Kartal in the Kartal Action.
- Under the language of its insurance policies, Great American has no duty to defend or pay expenses incurred by the Changs with respect to cross-complaints the Changs filed against other parties in the Kartal Action.
- Under the language of its insurance policies, Great American has no duty to pay expenses incurred by the Changs in seeking recovery from the California Underground Storage Tank Fund.
- Under the language of its insurance policies, Great American has no duty to defend or indemnify the Changs as to cross-complaints filed against the Changs in the Kartal Action.
- Because Great American is entitled to partial summary judgment of the above issues, the Changs are not entitled to any recovery from Great American under their counterclaims for breach of contract and breach of the covenant of good faith and fair dealing.

IT IS SO ORDERED.

Dated: June 19, 2013


UNITED STATES DISTRICT JUDGE